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Supreme Court of the United States

October Term, 1965.

No. 312

MOUNT VERNON FIRE INSURANCE COMPANY, an insurance company,

Petitioner,

vs.

HIGHWAY TRAILER COMPANY, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY AND SUPPLEMENTAL APPENDIX.

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SUPREME COURT OF THE UNITED STATES.

October Term, 1965.

No.

MOUNT VERNON FIRE INSURANCE COMPANY,
an insurance company,
Petitioner,

vs.

HIGHWAY TRAILER COMPANY, a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Mount Vernon Fire Insurance Company, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey entered in the above entitled case on March 7, 1966.

CITATIONS TO OPINION BELOW.

The opinion of the Supreme Court of New Jersey, printed in the Appendix herein is reported in 46 N. J. 442, —— A. 2d ——, 1966.

JURISDICTION.

The Supreme Court of New Jersey entered judgment in this case on March 7, 1966. The petitioner filed a petition for rehearing which petition was denied on April 4, 1966. The petitioner invokes the jurisdiction of this Court under 28 U. S. C. §1257 (3).

QUESTIONS PRESENTED.

1. Where a state court in an *ad hoc* decision refuses to follow its own established law and requires an insurance company to cover a loss, does it not thereby deprive the company of property without due process of law?

2. Where a state court relieves a party from its clear and unequivocal obligations under a contract, is not that court impairing the obligation of contract in violation of Article X, Section I of the United States Constitution?

CONSTITUTIONAL PROVISION INVOLVED.

The relevant constitutional provision involved in the instant case is Article 1, Section 10, Clause 1 of the United States Constitution and the Fourteenth Amendment to the Constitution. These sections provide:

> "No State shall enter into any Treaty, Alliance or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin, a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law; or Law impairing the Obligation of Contracts; or grant any Title of Nobility."
>
> * * * * * * * *
>
> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF FACTS.

In October, 1960 the respondent, Highway Trailer Company (hereinafter Highway), sold a trailer to Donna Motor Lines, Inc. (hereinafter Donna), for the sum of $14,430.86. Donna made an initial small down payment for the trailer and Highway retained a security interest in the trailer

through a conditional sales contract. Before delivery to Donna, the petitioner, Mount Vernon Fire Insurance Company (hereinafter Mount Vernon), issued a fire and theft policy covering the trailer. The policy named Donna as the insured and also contained the following provision: "Loss Payee: Any Loss hereunder is payable as interest may appear to the insured and Highway Trailer." The policy also contained the usual provision that the insured file a Proof of Loss with the petitioner and that the petitioner was not liable for payment for loss until this condition precedent was met.[1]

The insurance contract contained no agreement between Highway and Mount Vernon nor was there consideration for any agreement. Highway Trailer was merely delegated by Donna as a loss payee.

On December 16, 1960 Donna notified Mount Vernon that the insured vehicle was allegedly stolen. An investigation of certain facts concerning this alleged theft created suspicion in the mind of the representative of Mount Vernon

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[1] "(1) Insured's Duties When Loss Occurs: When loss occurs the insured shall:

* * * * * * * * * *

(c) file proof of loss with the company within sixty days after the occurrence of loss, unless such time is extended in writing by the company, in the form of a sworn statement of the insured setting forth the interest of the insured and of all others in the property affected, any encumbrances thereon, the actual cash value thereof at time of loss, the amount, place, time and cause of such loss, the amount of rental or other expense for which reimbursement is provided under this policy, together with original receipts therefor, and the description and amounts of all other insurance covering such property.

* * * * * * * * * *

(5) Payment for Loss; Action Against Company: Payment for loss may not be required nor shall action lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy nor until thirty days after proof of loss is filed and the amount of loss is determined as provided in this policy."

and Mount Vernon thereafter demanded that Donna file a Proof of Loss. A letter was forwarded by Mount Vernon to Donna's attorney specifically requesting a signed Proof of Loss. Neither this Proof of Loss nor any other Proof of Loss was ever sent to Mount Vernon or its representative. No demand for payment was ever made by Donna; and accordingly, no payment was made by Mount Vernon. Furthermore, Donna never instituted any action for payment under the terms of the instant policy.

Highway brought an action in the Superior Court of New Jersey, Law Division against Donna for the balance due under the conditional sales contract and against Mount Vernon upon its policy covering the theft of the trailer. Judgment against Donna was entered by default. Highway's claim against Mount Vernon was tried before the judge without a jury. The trial judge made the following findings of fact below: 1. that the trailer was stolen; 2. that Donna, the named insured, had failed to file a Proof of Loss as required by the policy; 3. that compliance with the requirement for filing a Proof of Loss had not been waived by Mount Vernon. The trial judge then ruled that Highway was a mere loss payee and that as a loss payee it had no greater rights than the assured. He further held that since Donna had committed a breach of the policy (failure to file a Proof of Loss) which would preclude its recovery against Mount Vernon, Highway as its loss payee would be similarly barred.

Highway appealed and the judgment of the trial court was affirmed by the Appellate Division. The Appellate Division in its opinion noted that Donna failed to file a Proof of Loss and, therefore, it could not recover. It applied the proper law and then concluded that since Donna could not recover, Highway as its loss payee could likewise not recover.

Highway then petitioned the Supreme Court of New Jersey for certification of the Appellate Division opinion

and this petition was granted. 45 N. J. 590 (1965). The Supreme Court of New Jersey in its opinion also found that because Donna did not file a Proof of Loss it could not recover against Mount Vernon. However, using the principle of equitable estoppel it held that Mount Vernon had allegedly "lulled" Highway into "inaction" by supposedly allowing Highway to think that Donna had complied with the condition precedent of filing a Proof of Loss. Employing this principle the New Jersey Supreme Court then held that Mount Vernon was estopped from asserting failure to meet a condition precedent in the contract (filing Proof of Loss against Highway).

This Petition for Certiorari now follows.

HOW THE FEDERAL QUESTION AROSE.

The federal question arose when the Supreme Court of New Jersey reversed the decision of two courts below and applied a questionable principle of law in asserting that the petitioner could not hold the respondent loss-payee to all the obligations under the insurance contract.

THE NEW JERSEY SUPREME COURT IN ITS ERRONEOUS AD HOC DECISION BELOW DEPRIVED THE PETITIONER OF PROPERTY WITHOUT DUE PROCESS OF LAW.

In the case at bar Highway was a mere loss appointee and payee to the contract of insurance between Mount Vernon and Donna. There was no contract of insurance between the petitioner and Highway.

It is well established in all jurisdictions throughout the United States that a loss appointee in a loss payable clause has no rights superior or independent of those of the assured. The loss payee does not have an independent contract with the insurer but his rights are derivative from those of the insured. The leading treatises on the field of insurance law have restated this fundamental principle in the following manner:

> "Under a simple loss-payable or open-mortgage clause, the mortgagee is simply an appointee to receive the insurance fund recoverable in case of loss to the extent of his interest, and his right of recovery is no greater than the right of the mortgagor.
>
> "Under a simple loss-payable clause, the interest which is insured is the interest of the mortgagor in the property. The fact that the policy is payable to a mortgagee is not an insurance of the mortgagee's interest, but of the mortgagor's interest. Accordingly, when the mortgage debt is extinguished in any manner it necessarily follows that the mortgagee is not entitled to any proceeds of insurance under the loss-payable clause."
>
> * * * * * * * * *
>
> "The addition of a simple mortgagee clause does not otherwise alter the terms of the insurance contract. Thus the fact that the policy is so made payable does not have the effect of canceling conditions precedent to recovery by the mortgagor. Conversely, under a simple loss-payable or open-mortgage clause in an automobile collision policy a breach of any condition of the contract by the insured owner that would prevent recovery by him precludes recovery from the insurer by the mortgagee as his mere appointee to receive the money to the extent of his interest in the mortgaged property.

In sum, the mortgagee's rights under an open-mortgage clause are no greater than those of the insured; his right of recovery does not exist if the insured's rights have been forfeited by a breach of conditions, unless the breach is waived." 11 *Couch, Insurance* 2d §42: 660-61; 63 ( ).

* * * * * * * * *

"In the open form, the mortgagee stands in the mortgagor's shoes, and is usually considered subject to the same defenses.

"From the point of view of legal interpretation, it has been held that a mortgagee under an open clause is an appointee only to receive the funds payable in the event of loss; it is not an assignment of the contract, but an appointment only. It does not create a new contract with the payee nor abrogate any condition of the policy. The rights of such appointee are, therefore, no greater than those of the insured, nor is an undertaking thereby imported to pay the mortgagee, independent of that to pay the insured or mortgagor. And, in any event, such a policy is insurance on the property of the mortgagor as owner, rather than on the interest of the mortgagee. The sum for which the company is liable, therefore, is not the loss of the mortgagee, but the loss of the insured; and the loss would extend only to the balance owing to the mortgage holder at the time the loss occurs.

"An open loss payable clause does not, therefore, operate as a separate contract between the mortgagee and the company; but the policy remains one between the company and the owner, with a right of collection vested in the mortgagee by appointment." 5 *Appleman, Insurance* §3401, pp. 554-56 (1941).

Since the rights of a loss payee are derivative and cannot exceed those of the insured, then the loss payee's right of recovery cannot be greater than those of the insured. If the insured cannot recover because of a breach of a condition of the insurance contract, likewise the loss payee cannot recover. The above is also a basic principle of insurance law and has been discussed by commentators on the subject.

> "Since under a simple loss-payable or open-mortgage clause the mortgagee is simply an appointee to receive the insurance fund to the extent of his interest, his right of recovery is no greater than the right of the mortgagor, so that a breach of the conditions of the policy by the mortgagor which would prevent a recovery by him precludes recovery from the insurer by the mortgagee.
>
> "In other words, where the mortgagee is a mere appointee by reason of an open, loss-payable clause, which, in terms, does not specifically protect him against the acts and omissions of the mortgagor, the effect is to place the mortgagee's indemnity at the risk of any act and omission of the mortgagor that would void, terminate, or affect the insurance of the latter's interest under the policy, and the mortgagee cannot recover if the mortgagor cannot. And in a number of instances where the loss has been made payable in the first instance to a mortgagee as his interest may appear, but no mortgage clause constituting a contract between the insurer and the mortgagee has been inserted in or attached to the contract, that is, where the clause is an ordinary or so-called "open" one, or is held to render the mortgagee an appointee under the contingent clause to recover the proceeds, he was not protected against the mortgagor's invalidating or forfeiting acts. This follows from the fact that the right of the mortgagee under the

simple mortgage clause is solely derivative and cannot rise above those of the owner, so that if the insured mortgagor cannot recover, the mortgagee likewise cannot." 11 *Couch, Insurance* 2d, supra at 671.

* * * * * * * * *

"In the open form, the indemnity of the mortgagee is subject to the risk of every act and neglect of the mortgagor which would avoid the original policy in the mortgagor's hands. The rights of the mortgagee in that type of contract are purely derivative; and if the mortgagor would have no right to recover, neither would the mortgagee." 5 *Appleman Insurance* §3401, p. 561.

* * * * * * * * *

"The courts are practically unanimous in holding that under a simple loss-payable or open-mortgage clause in a policy of insurance issued to the mortgagor, and payable to the mortgagee as his interest may appear, the mortgagee is simply an appointee of the insurance fund, whose right of recovery is no greater than the right of the mortgagor, so that a breach of the conditions of the policy by the mortgagor, which would prevent a recovery by him, precludes recovery from the insurer by the mortgagee." 38 A. L. R. 367, 368.

The courts of New Jersey have repeatedly adhered to the above principle and have denied recovery to a loss payee when his insured has violated the conditions of the contract. Their attitude on this issue is reflected in the following statements from apposite cases in this area.

"The rule of law is settled that a direction in policy that the money, if it becomes due, is to be paid to a designated person, does not alter the agreement of insurance

in any respect, except in the one particular of appointing a denominated person to receive such payment. It is still the owner of the premises who is insured, and the continued validity of the policy is dependent upon the performance by him of the conditions embraced in it." *Warbasse v. Sussex County National Insurance Co.*, 42 N. J. L. 198, 206 (Sup. Ct. 1890).

"In the contracts or policies of insurance, the words 'loss if any payable to ..... as interest may appear,' has not been considered as insuring the interest of such person. Such a person is not the assured, and if the interest of the assured fails, no interest which the payee may have can give rise to any liability. It does not refer to and include insuring the separate interest of the payee, but is limited to the personal interest of the assured at the time of the loss. This seems to be the logical interpretation of the ordinary contract of insurance, and it is firmly established by the authority of adjudged cases. *Bates v. Equitable Insurance Co.*, 10 Wall. 33; *Fogg v. Middlesex Insurance Co.*, 10 Cush. 337; *Froehly v. North St. Louis Insurance Co.*, 32 Mo. App. 302. It is only a direction in advance as to the mode of payment. *Martin v. Franklin Insurance Co.*, 9 Vroom 140. A breach of the conditions of the policy by the insured would defeat her right to recover this loss." *Milliken v. Woodward*, 64 N. J. L. 444, 450 (Sup. Ct. 1900).

"Nor did Roberts, as mortgagee, stand in any better position by virtue of the interlined clause, 'loss, if any, payable to Leonard D. Roberts, mortgagee, as his interest may appear.' In such case the law is settled in this state that a mortgagee cannot recover if the owner could not." *Hanson v. National Library Fire Insurance Co. of America*, 100 N. J. L. 215, 217 (Sup. Ct., 1924).

In view of the foregoing there can be no question that Highway's right to recovery was not greater than Donna's and Highway was bound by all the conditions of the contract. The instant contract specifically and unambiguously required as a condition of the contract that a Proof of Loss be filed within 60 days after the occurrence of loss. A further provision of the contract apprised the insured and the loss payee that the petitioner was not required to pay for the loss until *all* conditions precedent of the contract were complied with and until thirty days after a Proof of Loss was filed.

Thus before Donna could recover under the insurance contract it had to comply with the *condition precedent* of filing a Proof of Loss. Absent such a Proof of Loss, the petitioner was not required to pay any proceeds. Since Highway was a mere loss payee to the contract, it was bound by the same conditions as Donna and a violation of any of the conditions precedent by Donna would also bar recovery by Highway:

In *Coahoma County Bank & Trust Co. v. Feinberg,* 241 Miss. 381, 128 So. 2d 562 (Sup. Ct., 1961) a mortgagee of an automobile brought suit to collect on a theft insurance policy. The mortgagee was designated as a loss payee in the policy. The policy also provided that the insured must file a Proof of Loss as a condition precedent to payment. Neither the insured nor the mortgagee ever filed a Proof of Loss that the automobile was stolen. The court denied recovery and in doing so stated:

> "The loss payable clause in the policy did not create a new contract with the mortgagee, and the mortgagee had no right to recover under the policy unless the insured Feinberg had a right to recover for the theft of his automobile. *Aetna Ins. Co. v. Cowan,* 111 Miss. 453, 71 So. 746."

* * * * * * * * *

"We have carefully read the authorities cited by the appellant, . . ., and we do not believe they help the appellant, because the insurance company had a right to rely upon the conditions of its policy requiring 'proof of loss,' it was the duty of the appellant Bank to prove not only that there was a loss by theft under the policy, but also to prove that the insured, or some person on behalf of the insured, filed a sworn proof of loss with the appellee insurance company. See the following authorities: *Appleman's Insurance Law and Practice*, Vol. 5, Sec. 3613 p. 798; Ibid., Vol. 8, Sec. 4746 p. 145 (The burden of proving an excuse for a failure to give the required notice rests upon the insured.); *Wheeler v. London Guarantee & Accident Co., Ltd.*, 1934, 180 La. 366, 156 So. 420; *Lambert v. Travellers Fire Ins. Co.*, 5 Cir., 1960, 274 F. 2d 685." 128 So. 2d at 565-66.

In *Farmers & Depositors Bank v. Commonwealth Ins. Co. of New York*, 312 Ky. 151, 226 S. W. at 773 (Sup. Ct. 1950), the mortgagee of a truck was designated as a loss payee in an insurance contract covering the truck. The contract provided that an assignment of interest in the truck by the insured constituted a forfeiture. The insured, in the above case, sold the truck shortly before the collision occurred. In holding that the loss payee could not recover, the court stated:

"As is well known, policies of property insurance generally fall into two classes. One contains what is known as the union or standard mortgage clause, which is ordinarily held to operate as an independent contract between the insurer and the mortgagee. The other contains a simple loss-payable or open mortgage clause, in which the loss is recited as being payable to the mortgagee 'as his interest may appear.' The present policy is of this class. The contract was ex-

pressly made between the company as insurer and Fred Inman as the insured. The provisions designating the bank as 'loss payee' did not bring it and the company into contractual relations with each other. The bank was simply a conditional appointee of the insured owner of the property to receive the proceeds according to its lien upon the property. Its right was collateral to the right of the owner to recover and it could be no greater than his. A breach of any condition of the contract by the insured owner that would prevent recovery by him precludes recovery from the insurance company by the mortgagee as his mere appointee to receive the money to the extent of its interest in the mortgaged property."

* * * * * * * * *

"The bank's rights were under and subject to the insurance contract and limited to the company's obligation to pay as determined by its terms. As a stranger to the contract and only as appointee of the owner insured against loss, the bank could acquire no title or right of subrogation when all the title and insurable interest of the named owner terminated." 226 S. W. 2d at 774.

Since Donna did not sustain the obligation of filing a Proof of Loss then it cannot recover under the contract. The Supreme Court of New Jersey as well as the lower courts all agree on this fact. However, the New Jersey Supreme Court still allowed Highway to recover because they ruled that the petitioner should have affirmatively apprised Highway that Donna was delinquent in filing a Proof of Loss. In ruling in this manner, the court fell in error.

It is unquestionable that an insured must give notice and Proof of Loss as required by the insurance contract. It is an affirmative burden which must be met before there can

be recovery by the insured. 5 *Appleman, Insurance Law & Practice,* §3481 (1941).

Some jurisdictions hold that the mortgagee in a loss payable clause has the same duty as the assured with regard to filing a Proof of Loss. 5 *Appleman,* supra at §3485, *Armstrong v. Agricultura. Insurance Co.,* 9 N. Y. S. 873 (1890), *Lombard Investment Co. v. Dwelling House Ins. Co.,* 62 Mo. App. 315 (1895). In fact, there have been instances where courts have denied recovery where the assured failed to file a Proof of Loss, even though the mortgagee had a "standard mortgage" clause which provided that no neglect of the mortgagor would affect the rights of the mortgagee. 5 *Appleman,* supra at §3485, *Union Institution for Savings in City of Boston v. Phoenix Ins. Co.,* 196 Mass. 230, 81 N. E. 994 (Sup. Jud. Ct., 1907); 5 *Couch, Insurance* 2d §42; 715.

The New Jersey Supreme Court also erred when it held that the petitioner can not assert failure to file Proof of Loss because of equitable estoppel. The court ruled that the petitioner's conduct led Highway to change their position in that they did not file a Proof of Loss or see that Donna filed same.

It is respectfully submitted that the above reasoning is patently erroneous. Initially, Highway had a copy of the contract which specifically provided that the filing of a Proof of Loss was a condition precedent to recovery. Highway knew full well that it was a mere loss payee and as such its rights of recovery could be defeated by Donna's neglect. Therefore, it had the affirmative obligation to check if Donna had filed such Proof of Loss and to file the Proof of Loss if Donna failed to do so.

Additionally, the petitioner did not have a duty to apprise Highway of Donna's failure to file a Proof of Loss. The Petitioner's mere silence cannot be construed as *affirmative* conduct which made Highway change their position. There is no evidence whtsoever that there was ever a change of

position on the part of Highway. Lastly, equitable estoppel contemplates an affirmative action or conduct which causes another to change his position to his detriment. This principle does not contemplate mere inaction or silence of a party such as existed in the case *sub judice*. 3 Pomeroy's, *Equity Jurisprudence* §804 (5th ed. 1941).

In view of the foregoing, it is respectfully submitted that the New Jersey Supreme Court in reaching a novel and erroneous decision contrary to all basic principles of insurance law, deprived the petitioner of property ($13,000) without due process of law.

THE NEW JERSEY SUPREME COURT BY ITS DECISION RELIEVING THE OBLIGATION OF THE INSURED FROM FILING A PROOF OF LOSS IMPAIRED THE OBLIGATION OF CONTRACT IN VIOLATION OF THE UNITED STATES CONSTITUTION.

Article X, Sec. I of the United States Constitution prohibits any state from impairing the obligation of contract. Although the above proscription generally refers to legislative acts of a state, it can apply to judicial decisions of a state court. *Tidal Oil Co. v. Flanagan*, 263 U. S. 444, 450-453 (1923); *McCulloch v. Virginia*, 172 U. S. 102 (1898); *Butz v. City of Mascatine*, 75 U. S. 575, 584 (1869). "The obligation of a contract is the law which binds the parties to perform their agreement." *Home Building & Loan Ass'n v. Blaisdell*, 290 U. S. 398, 429 (1934). This court has stated that the "laws which subsist at the time and place of the making of the contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to as incorporated in its terms." *Wood v. Lovett*, 313 U. S. 362, 370 (1941). "This principle embraces alike

those which affect its validity, construction, discharge or enforcement." *Van Hoffman v. City of Quincy,* 71 U. S. 535, 550 (1866).

"The obligations of a contract are impaired by a law which renders them invalid or releases or extinguishes them." *Home Building & Loan Ass'n v. Blaisdell,* supra at 431. "Impairment has been predicated of laws which without destroying contracts derogate from substantial contractual rights." *See generally* Wright, *The Contract Clause of the Constitution,* Ch. 11 (Cambridge 1938); Forkosch, *Constitutional Law* §311 (1963).

When parties enter into a contract they expect that their intentions as expressed in the contract will be carried out. All promised performances, conditions and obligations are expected to be effected in compliance with the terms agreed upon at the signing of the contract. If a party conditions his performance on the obligation of another, then he has specifically protected himself from performing unless the other party perform his obligation.

In the case at bar, the insurance contract provided in the clearest and simplest terms that Donna had the specific obligation of filing a Proof of Loss and that the petitioner was not required to perform until Donna fulfilled this obligation. As established previously, since Highway was merely a loss appointee it was also bound by this condition. Therefore, the petitioner reasonably expected when it entered into the contract that Donna or Highway would fulfill the most basic obligation of all insurance contracts—that there was, in fact, a loss. The petitioner (as does all insurance companies) specifically conditioned its performance upon a precedent showing by the insured that there was a loss.

The Supreme Court of New Jersey by allowing Highway to recover without fulfilling the condition precedent of filing a Proof of Loss impaired the obligations of the instant

contract. Under the clear and unequivocal terms of the contract, the petitioner need not perform until the obligation of filing a Proof of Loss was met. The New Jersey Supreme Court by applying a new and questionable principle of law relieved Donna and Highway of the most basic and important obligation of the contract and required the petitioner to pay the proceeds without the above obligation ever being met by the insured or his loss appointee. Thus the New Jersey Supreme Court in its rendering its decision rewrote and changed the basic terms and obligations of the contract in direct violation of Article X, Sec. I of the United States Constitution.

CONCLUSION.

For the reasons discussed above, it is respectfully urged that certiorari should issue to review the decision of the court below.

Respectfully submitted,

FRIEDMAN & D'ALESSANDRO,
Attorneys for Petitioner,
By EDWARD G. D'ALESSANDRO,
A Member of the Firm.

Supplemental Appendix

OPINION OF SUPREME COURT OF NEW JERSEY.

Argued , Decided

MR. CHARLES N. KORS argued the cause for the Plaintiff-Appellant (MESSRS. KORS & RUBIN, attorneys).

MR. EDWARD G. D'ALESSANDRO argued the cause for the Defendant-Respondent (MESSRS. FRIEDMAN & D'ALESSANDRO, attorneys; MR. LOUIS M. MINOTTI on the brief).

The opinion of the court was delivered by

PROCTOR, J.

This appeal concerns the rights of a loss payee under a theft insurance policy.

In October 1960 the plaintiff, Highway Trailer Company (Highway), sold a trailer to Donna Motor Lines, Inc. (Donna) for $14,430.86. Donna made a small down payment and Highway retained a security interest in the trailer through a conditional sale contract. The balance due was to be paid in monthly installments. Before delivery to Donna, Mount Vernon Fire Insurance Company (Mount

Vernon), the defendant, issued a fire and theft policy covering the trailer. This policy named Donna as the insured and also contained the following provision: "Loss Payee: Any loss hereunder is payable as interest may appear to the insured and Highway Trailer." In early December, before the first installment payment had been made by Donna, the trailer disappeared from a parking lot in Chicago. Highway did not receive any further payments from Donna and on June 26, 1961, brought an action against Donna for the balance due under the conditional sale contract and against Mount Vernon upon its policy covering the theft of the trailer. Judgment against Donna was entered by default. Highway's claim against Mount Vernon was tried in the Law Division without a jury. The trial judge found that the trailer was stolen. However, he also found that Donna, the named insured, had failed to file a proof of loss as required by the policy[1] and that compliance with this requirement had not been waived by Mount Vernon. He held that

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[1] The policy provides:

"(1) Insured's Duties When Loss Occurs: When loss occurs the insured shall:

* * * * * * * * * *

(c) file proof of loss with the company within sixty days after the occurrence of loss, unless such time is extended in writing by the company, in the form of a sworn statement of the insured setting forth the interest of the insured and of all others in the property affected, any encumbrances thereon, the actual cash value thereof at time of loss, the amount, place, time and cause of such loss, the amount of rental or other expense for which reimbursement is provided under this policy, together with original receipts therefor, and the description and amounts of all other insurance covering such property.

* * * * * * * * * *

(5) Payment for Loss; Action Against Company: Payment for loss may not be required nor shall action lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy nor until thirty days after proof of loss is filed and the amount of loss is determined as provided in this policy."

highway, as a loss payee, had no greater rights than the insured and, since Donna had committed a breach of the policy which would preclude its recovery against Mount Vernon, Highway was similarly barred. Highway appealed and the judgment of the trial court was affirmed by the Appellate Division. We granted Highway's petition for certification. 45 N. J. 590 (1965).

The trial judge made detailed findings of fact which are not disputed by either of the parties on this appeal. In late November 1960 Donna's trailer made its first run, hauling cargo from Jersey City to Chicago. It arrived in Chicago on Friday, November 30, and was unloaded by the driver and left in a parking lot for the weekend. On Monday, December 3, the driver discovered that the trailer was missing from the lot and he immediately notified the police and the Federal Bureau of Investigation. The value of the trailer at the time of the theft was $13,000, an amount less than Donna's outstanding debt to Highway under the conditional sale contract. No part of Highway's default judgment against Donna has been satisfied.

On December 16, 1960, Lawrence Charron, the president of Donna, personally reported the loss to Frank Walsh, the general agent of Mount Vernon.[2] At about the same time Charron also notified James O'Shea, the sales manager of Highway, that the trailer had been stolen. Sometime before Christmas 1960, O'Shea telephoned Walsh to discuss the loss. In that conversation Walsh asked O'Shea for a copy of the sales order and the conditional sale contract, both of which were subsequently sent to Walsh's office. During that same conversation O'Shea inquired if all the conditions of the policy had been met. Walsh replied that everything as of that time was in order.

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[2] It was conceded at the trial that Walsh and Mount Vernon "are practically one."

The trial court further found that about January 1, 1961, Charron telephoned Walsh to inquire about the status of the claim. Walsh informed him that he was going to Chicago to personally investigate the theft. Early in January Walsh spent four days in Chicago checking into the facts surrounding the disappearance of the trailer, and as a result of his investigation he became suspicious of the legitimacy of the loss. Because of his suspicion he decided to take no further action on the claim, in his own words to "stand pat."[3] However, the trial court specifically found that at no time before the trial did Walsh ever indicate to O'Shea or any other representative of Highway that he suspected the genuineness of the theft.

Between January and May of 1961 O'Shea had several conversations with Walsh in which he attempted to find out why there was a delay in settling Highway's claim. In each instance Walsh told him that the matter was still under investigation. During these conversations Walsh also discussed with O'Shea the price of a replacement for the missing trailer. At the last conversation Walsh inquired if Mount Vernon would receive a price reduction if a replacement trailer were purchased from Highway. He stated that otherwise he could probably obtain a trailer equivalent to the missing one from another company at a lower price. O'Shea said that Highway would not reduce its price and

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[3] "The Court: * * * You were going to stand pat on the claim. Now, what did you mean by that phrase 'stand pat on the claim'?

The Witness [Walsh]: That I would not of my own volition tender any offer of settlement; neither would I deny on the claim until further proof was presented to me as to the legitimacy of the loss.

Q. This was an interpretation of the state of mind of yourself. Is that correct?

A. Yes.

Q. This was not verbally said by you to anyone?

A. No, sir."

that the matter was being referred to an attorney.

In early May 1961 Donna's attorney, John Wygant, asked Walsh when Donna's claim would be satisfied. Walsh replied that a proof of loss would have to be filed with Mount Vernon before payment could be considered and he sent Wygant the necessary form with instructions that the executed proof of loss be returned "at your earliest convenience." Proof of loss was never filed by Wygant or Donna, and Wygant died in August 1961.[4] However, there is no suggestion in the record that O'Shea or any other representative of Highway was aware that Walsh requested Wygant to file a proof of loss.

Although much of the testimony at the trial concerned Walsh's suspicion that a real theft had not occurred, the trial court found that the loss was genuine. Mount Vernon does not challenge this finding.

The trial court and the Appellate Division found that Donna, by failing to file a proof of loss as required by the policy, would not have been able to recover against Mount Vernon. They also found that Highway's rights under the policy were those of a simple loss payee. Both courts then applied the general rule that a payee under a loss payable clause (as distinguished from a standard mortgagee clause) is a mere appointee who may not recover if the insured has breached any provision of the policy which would prevent recovery by him. E.g., *Hanson v. National Liberty Fire Ins. Co. of America,* 100 N. J. L. 215 (Sup. Ct. 1924); 5 Appleman, *Insurance* §3335 (1941); Annotation, 38 A. L. R. 367

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[4] The trial court did not consider relevant the evidence concerning Walsh's dealings with Wygant because it found no proof that Wygant had been retained to represent Donna in its negotiations with Mount Vernon. Although the Appellate Division found the evidence sufficient to establish that Wygant did in fact represent Donna and that Mount Vernon did extend the time for filing the proof of loss, it affirmed the trial court because Donna at no time filed a proof of loss.

(1925). In short, both courts held that since Donna had no rights against Mount Vernon, Highway had none.

We accept the finding that Donna would be barred from any recovery under the terms of the policy. However, we think that the rule of law stated above was misapplied by the trial court and the Appellate Division to the facts of this case.

It is true that ordinarily the rights of a loss payee are derivative and cannot exceed those of the insured. *Hanson v. National Liberty Fire Ins. Co. of America, supra.* But it is also true that a loss payee acquires independent "equitable rights, which the insurer is bound to regard." *Martin v. Franklin Fire Insurance Co.*, 38 N. J. L. 140, 143 (Sup. Ct. 1875). Not only did the policy issued by Mount Vernon name Highway as a loss payee, but soon after the theft of the trailer O'Shea sent Walsh, at his request, a copy of the sales order and the conditional sale contract. Thus, Mount Vernon was fully aware that Donna had paid only a small part of the purchase price and that Highway had the major, if not the sole, interest in the proceeds of the policy. Yet at no time did Mount Vernon give the slightest indication to Highway that there was any defect in the formal presentation of the claim or that its reason for delaying settlement was a suspicion concerning the legitimacy of the loss. When O'Shea first communicated with Walsh, he asked if all the conditions of the policy had been met and Walsh told him that everything as of that time was in order. In subsequent conversations Walsh never said or did anything to change that impression. Indeed, at those later occasions when O'Shea inquired why the claim had not been settled, he was informed that the need for further investigation was the sole cause of delay. In fact, at the times of these later inquiries Walsh had already completed his investigation and had decided to "stand pat on the claim."

We think that under the doctrine of equitable estoppel

Walsh's conduct precludes Mount Vernon from asserting against Highway any rights which might have otherwise arisen from Donna's failure to file a proof of loss:

> "Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy." 3 *Pomeroy's Equity Jurisprudence* §804 (5th ed. 1941).

See also *State v. United States Steel Corp.*, 22 N. J. 341, 358 (1956); *Bayonne v. Passaic Consolidated Water Co.*, 98 N. J. Eq. 171, 177 (Ch. 1925).

The pattern of Walsh's conduct was designed to lead Highway to believe that all the conditions of the policy, on which Mount Vernon was going to insist, had been met and that settlement merely awaited the completion of the insurer's investigation. Had Highway been aware that a proof of loss was not filed by Donna or that Mount Vernon intended to demand the filing of such a document, it could have taken appropriate steps to protect its interests. In these circumstances Mount Vernon should not be permitted to benefit from the very condition in the policy which Walsh's conduct led Highway to believe was already fulfilled or was of no significance to the ultimate settlement of the claim. We hold that where, as here, the insurer knows that the loss payee of a theft insurance policy has a vital interest in the claim and by its conduct leads the loss payee reasonably to believe that the claim has been adequately presented, thereby lulling the loss payee into inaction, the insurer is estopped from asserting any defect in the presentation of that claim. See *State Insurance Co. v.*

Maackens, 38 N. J. L. 564, 569 (E. & A. 1876); *Bank of Oroville v. Minnesota Fire Ins. Co.*, 132 Cal. App. 510, 23 P. 2d 83 (1933); *cf.* N. J. S. A. 17:36-6.

For the reasons stated above the judgment below is reversed and the matter is remanded to the trial court with directions to enter a judgment for the plaintiff, Highway Trailer Company, against the defendant, Mount Vernon Fire Insurance Company, in the amount of $13,000, together with interest.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 312

MOUNT VERNON FIRE INSURANCE COMPANY,
an insurance company,
Petitioner,

vs.

HIGHWAY TRAILER COMPANY, a corporation,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CHARLES N. KORS,
On the Brief.

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Counter-Statement of Facts

From first to last this was an ordinary civil suit on a policy of theft insurance. It involved nothing, even by suggestion, that has the aspect of a federal question.

In Petitioner's "Statement of Facts" (p. 3) the facts that are given are decidedly in a minor relation to those that are not given. If there is any fault in the New Jersey Supreme Court decision it is not where Petitioner says it is but rather in the Court's failure to give effect to elements in the case favorable to appellant, and at least as compelling if not more so, than that which in the Court's opinion finally determined the result in this Respondent's favor. In making this statement our reference is to things in the record that are not disputed, as follows:

Continuously for three years following the report of the theft Petitioner's spokesman professed to be "suspicious" of the claim, and just as continually for three years—down to the time of trial—declared himself busy with "investigation", (Record 152a, 35-40). This induced the Petitioner-insurer not to reject the claim and not to deny it, but rather, in the words of its spokesman, to "stand pat", (Record 122a, 20; 123a, 28-30). The ultimate meaning of this performance by the company was of course that it would not pay the claim which could in reason and under the cases be viewed only as rejection.

Also undisputed was the fact that Petitioner-insurer had demanded of Donna Motor Company, the primary insured, proof of the loss in terms definitely more exacting than anything required by the policy itself. (Record 150a, 30 to 40; 173a, 1 to 15. See p. 3 of policy, supplement to record.)

In addition, there were cited to the New Jersey Supreme Court numerous New Jersey cases to show that Petitioner-insurer's conduct throughout had worked a waiver of proof of loss. (Cases, Appendix I hereto). Indeed, the Appellate

Division held that such waiver *had actually occurred*, notwithstanding which its opinion implies the assumption of an *unwaiving of the waiver* without its stating how such a phenomenon had or could have ensued. (Appellate Division Opinion, appendix 2 hereto; see 3rd par.)

Also, the Petitioner's "suspicion" respecting theft of the trailer was for every purpose of the case finally resolved by the trial Court's finding that the theft from the beginning was genuine and the claim valid, which finding the Petition admits, and concerning which no question was raised in either appellate court. The finding was basic and removed from the case retroactively the only excuse Petitioner ever gave for not paying the claim.

In addition to waiver by Petitioner's own conduct of its right to formal loss proof, there is the concrete fact of its request for such proof several months after the lapse of the 60-day period and after insured's business had been ruined by the delay (Record 49a, 15 to 30; 168a, 26).

Petitioner sought to absolve itself from all obligation to Respondent by ascribing to it a non-privity status in the transaction. This resort was completely obstructed by three things. One, virtually the only real interest in the subject of the insurance was that of Respondent in its conditional sale agreement, only one payment out of the numerous payments required having been made. Two, Respondent's insurable interest, recognized and established by the New Jersey Sales Act, N.J.S.A. 12a:2-501, as follows:

> "(2) The seller retains an insurable interest in goods so long as title to or any secured interest in the goods remains in him."

Three, Respondent's resulting authority in the situation, recognized and sought for exploitation by Petitioner in its

going to Respondent, entirely apart from any matter of loss proof by Donna, as the New Jersey Supreme Court observed, and negotiating with Respondent for settlement of the insurance claim by Respondent's acceptance of another and cheaper trailer of Petitioner's choosing.

Nor is it to be forgotten that the very language designating Respondent as loss payee in the policy called for payment by Petitioner to Respondent "as its (Respondent's) interest may appear."

ARGUMENT

POINT I

The petition for certiorari shows no semblance of ground for the granting of the writ.

Jurisdiction is said at p. 2 to be invoked under 28 U.S.C. 1257 (3). This case concerns nothing within the cited code section, viz:

(a) The validity of a treaty or statute of the United States.

(b) The validity of a statute claimed to be repugnant to the Constitution, treaty or laws of the United States.

(c) Any right, title, privilege or immunity set up or claimed under the Constitution, treaty or statutes of, or commission held or exercised under, the United States.

The distinct feature of this Petition is its incredible naivete. We read in the Petition that the "Constitutional provision involved" (p. 3) is Article I, Sec. 10, Clause I, of the Federal Constitution and the 14th Amendment thereof. The designated Section and Clause of Article I pro-

vides what "No *State* shall" do; and the particular final clause of the 14th Amendment, which Petitioner would mold to its purpose, begins: "Nor shall any *State* * * *". Not even remotely are we concerned here with a State or a statute.

It is no extravagance to say that if this case as decided by the New Jersey Supreme Court really involves anything within the foregoing Code section or Constitutional provisions, it must follow inevitably that every decision by every final Court of every State in the Union is reviewable by the United States Supreme Court. It would just about mean that the loser in the State court must be regarded as having been *deprived* and *denied* by the *State* within the meaning of the latter provision of the 14th Amendment and is thus endowed with right of appeal to the highest court in the land for further adjudication, an unthinkable proposition.

POINT II

The statement on page 6 of "how the federal question arose" demonstrates that no federal question ever arose.

Presumably this statement is offered as a compliance with Rule 23(f) of this Court, the pertinent portion of which reads:

> (f) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; * * *.

In the light of this rule we witness another test showing the gross inadequacy of this Petition. The assertion that (Petition, p. 6) "The Federal question arose when the Supreme Court of New Jersey reversed the decision of two courts below and applied a questionable principle of law * * *", given as a compliance with Rule 23(f) and being at the same time completely oblivious of the specific requirements of the Rule, is purely and simply the statement of an arrogated claim of right to appeal from the State Court to this Court. It can be nothing else. And the citing of cases from various states, as the Petition cites them, carries the suggestion that it is for this Court, in light of the instant disposition by the New Jersey Court, to achieve a plenary reconciliation of conflicting authorities.

From page 6, bottom, Petitioner quotes at length passages from insurance text books, all necessarily in the abstract and having not the least relation to our problem. From pages 10 and 14 the Petition is belabored with quotations from New Jersey cases and others that are completely pointless or which were or should have been included in the New Jersey argument. It is a fair observation that certiorari in this case could result in no more than Petitioner's leave to make in the United States Supreme Court the re-argument which the New Jersey Court denied in its rejection of petition for rehearing.

POINT III

The contention that an obligation of a contract was impaired is a manifest fallacy.

At page 16 the proposition is advanced that the New Jersey Supreme Court "impaired the obligations of a contract in violation of the United States Constitution". Obviously there was no impairment of a contract in any sense.

What the New Jersey court found was that Mount Vernon Fire Insurance Company, this Petitioner, had in effect waived compliance with a specific term of the contract, i.e., with the proof of loss provision, or in other words, using the court's formula, had *equitably estopped itself* from "asserting against Highway any right which might have otherwise arisen from Donna's failure to file proof of loss" (p. 7a). Mount Vernon's (Petitioner's) conduct toward Highway which worked to the latter's prejudice and resulted in the estoppel is fully delineated in the Supreme Court opinion (p. 6a). That opinion, so far from impairing any obligation of the insurance contract, postulated the effective subsistence of the contract, else none of its provisions could have been waived or affected by estoppel. It is one thing for a contractual obligation to be *impaired* and quite another for a contracting party to *forfeit* his right to enforce the obligation.

POINT IV

This case qualifies in no particular for the granting of certiorari.

Rule 19 of this Court reads in its opening paragraph as follows:

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered: • • •"

Nor does the Petition in any way relate to sub-sections (a) and (b) of the same Rule.

"Certiorari should not be granted except in cases involving principles the settlement of which is of importance to public, as distinguished from that of parties, and in cases where there is a real and embarrassing conflict of opinion and authority between Courts of Appeal. Rice v. Sioux City Memorial Parks Cemetery, U. S. Iowa 1955, 75 S. Ct. 614, 349 U. S. 70, 99 L. Ed. 897."

"Special and important reasons", within this rule relating to granting of certioari, relate to problems beyond the academic or episodic, especially where issues involved reach constitutional dimensions. Rice v. Sioux City Memorial Park Cemetery, ibid."

POINT V

Petitioner tries to show that the inhibitions upon the states imposed by Art. I, Sec. 10, Clause I and by 14th Amendment of the Constitution, are directed also to the state courts. There is no authority for this.

At page 16 Petitioner undertakes to expand the meaning of Article X, Sec. 1 relating to no State's impairing the obligation of a contract, so as to have it include the effects of judicial decisions as well as statutes. Nothing cited supports the proposition. In *Tidal Oil Co.* v. *Flanagan*, 263 U. S. 444 (1923) the Chief Justice states at p. 451:

"It has been settled by a long line of decisions that the provisions of Sec. 10, Art. 1, of the Federal Constitution protecting the obligations of contracts against State action is directed only against impairment by legislatures and not by judgments of courts. The language 'no State shall pass any law impairing the obligation of contracts' plainly requires such a

decision. However, the fact that it has been necessary for this Court to decide the question so many times is evidence of persistent error in regard to it."

In *McCulloch* v. *Virginia*, 172 U. S. 102 (1898) cited by Petitioner this Court dealt with a *statute* of Virginia. In *Butz* v. *City of Muscatine*, 75 U. S. 575 (1869) also cited, the court dealt with a *statute* of Iowa.

Nothing in all the cases and authorities cited aids the Petitioner's point. The principle to be taken from all of them, where the question involves a State court decision construing a statute so as to give it unconstitutional effect—which is not in this case at all—is that it is the *statute* that becomes the subject matter of the review and not the State court decision, this Court, needless to say, being completely unbound in its dealing with the statute by anything the State Court had decided.

CONCLUSION

For the foregoing reasons the Petition for Certiorari should be denied.

Respectfully submitted,

KORS AND RUBIN,
Attorneys for Respondent.

CHARLES N. KORS,
On the Brief.

APPENDIX 1

Cases Cited to State Court

Chesanski v. Merchants, 102 N. J. L. 414; 131 At. 910

Evans v. Farmers R. Ins. Co., 110 N. J. L. 159; 164 At. 258

Jones v. Mechanics Fire Ins. Co., 36 N. J. L. 29; 13 Am. Rep. 405

Guarraia v. Met. Life Ins. Co., 90 N. J. L. 682; 101 At. 298

Radwanski v. Scottish, etc., 100 N. J. L. 192; 126 At. 657

Rommage v. Merchants Fire Ins. Co., 13 N. J. L. 110

Rosenberg v. Maryland Cas. Co., 3 N. J. Misc. 1132; 102 N. J. L. 724; 132 At. 923

State Ins. Co. v. Maackens, 38 N. J. 564

APPENDIX 2

Opinion of the Superior Court of New Jersey, Appellate Division

(Filed—July 7, 1965)

Argued May 17, 1965—Decided July 7, 1965.

Before Judges Gaulkin, Foley and Collester.

Mr. Louis Greenberg argued the cause for the plaintiff (*Messrs. Kors and Rubin,* attorneys).

Mr. Edward G. D'Alessandro argued the cause for the defendants (*Messrs. Friedman & D'Alessandro,* attorneys).

PER CURIAM.

Plaintiff Highway Trailer Company (Highway) sued Donna Motor Lines, Inc. (Donna) for the balance due for a trailer sold to Donna by Highway upon a conditional sales contract. In a separate count, Highway sued Mount Vernon Fire Insurance Company (Mount Vernon) upon its policy covering the theft of the trailer. Judgment was entered by default in favor of Highway against Donna. After trial without a jury, judgment was entered in favor of Mount Vernon against Highway and Highway appeals.

The trial judge held that Mount Vernon was not liable to Highway because Donna had not filed a proof of loss as required by the policy.

Highway contends that filing of a proof of loss was waived altogether by Mount Vernon. The trial court found as a fact that there had not been such waiver, and, since

there was substantial evidence to support that finding, we accept it. *State* v. *Johnson*, 42 N. J. 146 (1964). However, we make the additional finding that filing "within 60 days after the occurrence of loss," as required by the policy, was waived.

The loss happened December 10, 1960. On May 2, 1961 Frank S. Walsh, the authorized agent of Mount Vernon, told John Wygant, Donna's attorney, that a proof of loss would be necessary before payment could be considered, and sent him the following letter:

> "Enclosed herewith you will find a Proof of Loss which we would thank you to have properly executed by an officer of Donna Motor Lines, and properly notarized, and return it to this office at your earliest convenience so that we may properly process this claim with the company.
>
> Thanking you for your attention to this matter, we are
>
> Yours very truly,
>
> Frank S. Walsh, Inc."

The trial judge held that there was not sufficient evidence to establish the attorney's agency to speak to Walsh about the claim or to receive the letter on behalf of Donna. We disagree. Lawrence Charron, president of Donna, testified that Wygant (who died before the trial) was Donna's attorney, and although he did not recall the conversations which he had "back and forth over the telephone" with the attorney or whether he retained him "to sue for the recovery of the value of this trailer," that " anything that pertained to this, he [the attorney] used to take care of it himself."

Appendix 2

Donna never filed a proof of loss. Mount Vernon took no further steps after May 2, 1961 upon which waiver could be predicated, and in June 1961 this action was commenced. The policy provides:

> "When loss occurs, the insured shall:
>
> * * *
>
> (c) file proof of loss with the company within sixty days after the occurrence of loss, unless such time is extended in writing by the company, in the form of a sworn statement of the insured setting forth the interest of the insured and of all others in the property affected, any encumbrances thereon, the actual cash value thereof at time of loss, the amount, place, time and cause of such loss, * * * and the description and amounts of all other insurance covering such property.
>
> * * *
>
> Payment for Loss; Action Against Company: Payment for loss may not be required nor shall action lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy nor until thirty days after proof of loss is filed and the amount of loss is determined as provided in this policy."

In addition, the policy contained the usual provisions for examination of the insured "under oath," appraisal in the event of disagreement as to the amount of loss, and other provisions relating to the evaluation and satisfaction of the loss which could hinge on the figures advanced by insured in a proof of loss.

Appendix 2

We are told that, while this action was pending, Highway filed what purported to be a proof of loss. We have not seen it, but a proof by Highway would not satisfy the above quoted provisions. Mount Vernon was entitled to a proof supported by the oath of the insured. *Cf. Reed* v. *Firemen's Insurance Co.*, 81 N. J. L. 523, 531 (E. & A. 1911).

It is well settled that a payee under a loss payable clause (as distinguished from a standard mortgagee clause) may not recover if the insured has breached any provision of the policy which would prevent a recovery by him. Here Donna could not recover and therefore Highway may not. *Dikowsky* v. *Metropolitan Life Ins. Co.*, 128 N. J. L. 124 (E. & A. 1941); *Hanson* v. *National Liberty Fire Ins. Co. of America*, 100 N. J. L. 215 (Sup. Ct. 1924); *Brindley* v. *Firemen's Ins. Co. of Newark*, 35 N. J. Super. 1 (App. Div. 1955); 5 Appleman, *Insurance*, §3335 (1941); 5 Couch, *Insurance*, §1215a, p. 4426 (1929).

The judgment is affirmed.